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Supreme Court, U. S.
FILED
AUG 13 1972
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

October Term, 1972

No. 72-101

JACOB JACK AVENI, JR.,
Bankrupt,
Petitioner,

vs.

MORTON RICHMAN,
Trustee in Bankruptcy,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

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JURISDICTION

The argument presented by the Petitioner on Section 70(a)(5), of the Bankruptcy Act is not a novel issue or case to be heard by the Supreme Court, although within the jurisdictional grounds of 28 U.S.C. § 1254(1).

The other arguments raised by Petitioner have never been raised in the lower courts and do not appear to be within the certiorari jurisdiction of the Supreme Court.

QUESTIONS PRESENTED FOR REVIEW

Whether the non-exempt portion of the Petitioner's wages, which accrued prior to the date of the filing of the petition in bankruptcy but which were unpaid as of the date of the filing of the petition in bankruptcy passes to the trustee in bankruptcy as property under Section 70(a)(5) of the Bankruptcy Act, 11 U.S.C. § 110(a)(5).

STATUTORY PROVISIONS INVOLVED

U. S. Bankruptcy Act, 11 U.S.C. Sec. 110(a)(5)

"The Trustee of the estate of a bankrupt and his successor and successors, if any, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition initiating in proceeding under this Act, except insofar as it is to property which is held to be exempt, to all of the following kinds of property wherever located. . . . (5) property, including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have levied upon and sold under judicial process against him, or otherwise seized, impounded, or sequestered: *Provided,* that rights of action ex delicto for libel, slander, injuries to the person of the bankrupt or of a relative, whether or not resulting in death, seduction and criminal conversation, shall not vest in the trustee unless by the law of the State such rights of action are subject to attachment, execution, garnishment, sequestration, or other judicial process: And *provided further,* THAT when any bankrupt, who is a natural person, shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash

surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets; . . . ."

U. S. Bankruptcy Act, 11 U.S.C. Sec. 24

"This Act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the laws of the United States or by the State laws in force at the time of the filing of the petition in the State wherein they have had their domicile for the six months immediately preceding the filing of the petition, or for a longer portion of such six months than in any other State: *Provided, however,* THAT no such allowance shall be made out of the property which a bankrupt transferred or concealed and which is recovered or the transfer of which is avoided under this Act for the benefit of the estate, except that, where the voided transfer was made by way of security only and the property recovered is in excess of the amount secured thereby, such allowance may be made out of such excess."

STATEMENT OF THE CASE

Respondent, for the purposes of this Brief in Opposition to Petitioner's Writ of Certiorari, accepts Petitioner's Statement of the Case.

ARGUMENT

I

The Issues Raised in the Petitioner's Brief Have Not Been Raised in the Lower Courts and Are Not Now Timely Brought.

The Petitioner has based this Court's jurisdiction over this case upon Title 28, Section 1254 of the United States Code. To come within the jurisdictional limits of Section 1254, the Petitioner must present an appropriate question for review. The writ of certiorari explicitly states that this Court is not to sit as a Court of first instance but is to review the disposition of the Court of Appeals.

The Petitioner in his argument, directly or indirectly, has urged upon this court three issues for consideration. They are for convenience herein referred to as: (1) Bankrupt's need for a "fresh start"; (2) Bankrupt's need for "subsistence"; (3) Uniformity of garnishment laws.

The record of this case illustrates that two of the three issues presented by the Petitioner's Petition for Writ of Certiorari have not been raised prior to this time and were not submitted to the lower courts for consideration. These two issues are those of subsistence and garnishment. The issue "fresh start" presented by Section 70 of the Bankruptcy Act was raised in a timely fashion in the courts below, and it is the only appropriate issue for consideration.

This Court has repeatedly spoken directly to the issue of review, *Lawns v. United States,* 355 U.S. 339 (1958) rehearing denied 355 U.S. 967 (1958); *United States v. Classic,* 313 U.S. 299 (1940) rehearing denied 314 U.S. 707 (1941). In *Lawns v. United States, supra,* this Court noted that the Supreme Court would review questions not raised in the lower court only in exceptional cases.

Respondent respectfully submits that the Petitioner has presented to this Court two issues which do not come within the jurisdictional requirements of Title 28 of the United States Code, Section 1254, or even the guidelines set forth in *Lawns v. United States, supra.*

II

In the Event That This Court Finds All the Questions Raised by the Petitioner Are Within the Discretionary Jurisdiction of This Court, Respondent States That the Circuit Court of Appeals Should Be Affirmed.

A. Wages due the Bankrupt and owed as of the date of filing of bankruptcy and which are not exempt under the applicable state laws do constitute property within the meaning of Section 70 of the Bankruptcy Act.

The question of what constitutes property for the purposes of employing Section 70 of the Bankruptcy Act is an issue that has been passed upon by this Court many times in the past. Section 70a(5) sets the test for this type of property. It states

> (5) property . . . which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him. . .

The Sixth Circuit Court of Appeals in the case herein has stated:

> The Bankruptcy Act is designated to give the bankrupt a fresh start to begin anew, but this concept should not be judicially expanded to include "property" which would otherwise vest in the trustee. Regular wages earned prior to the bankruptcy "are sufficiently rooted in the pre-bankruptcy past and so little entangled with

the bankrupt's ability to make an unencumbered fresh start" (Segal v. Rochelle, supra, 382 U.S. at 380), that they should be regarded as "property" under Sec. 70a(5) which passes to the trustee.

As is noted in the record before this Court, the Petitioner has totally failed to exclude the circumstances of this case from the clear criteria of Section 70a(5). Petitioner has further failed to demonstrate the necessity or logic of abandoning this test.

The term "property" is not a self-defining term. In this instance, however, the Bankruptcy Act has pronounced a clear formula for arriving at a determination of the question and has provided the means by which each individual case can be determined on the basis of its facts and by so doing, has provided a legal as well as clear standard.

The court held in *Frederick v. Lines*, 425 F.2d 215, 217 (9th Cir. 1970), aff'd 400 U.S. 18 (1970) that:

> From the employee's standpoint, there is no similarity between earned wages that he will receive at the end of the week and bookkeeping entries showing vacation credits that he can convert to cash only when he takes a vacation or is laid off. Those earned credits are as inaccessible to him as entries in his Social Security account before he reaches retirement age.

The same court also said at page 216:

> Under Section 70a(5) of the Bankruptcy Act (11 U.S.C. Section 110a(5), vacation is "property", title to which vests the trustee only if it is (1) non-exempt, (2) transferable or lienable and (3) so little entangled with the bankrupt's ability to make an unencumbered fresh start, that it should be so regarded.

B. The Petitioner has failed to demonstrate in any way the fact that the wages involved in the turn-over order were needed by him for his daily subsistence.

The specific purpose of the Bankruptcy Act is to "aid the unfortunate debtor by giving him a fresh start in life free of debt." *Stellwagen v. Clum,* 245 U.S. 605 (1918). The Bankruptcy Act also serves the rights of the creditors. The debtor's daily subsistence needs and the rights of the creditors can and do conflict. However, Respondent respectfully submits that in the instant case, the Petitioner has failed and refused to demonstrate such a need. As is noted in the record, the turn-over order at issue for $71.50 represents only the non-exempt portion of the $925.90 in wages earned by the Bankrupt during the 30 day period prior to his filing of bankruptcy. Furthermore, Section 70a of the Bankruptcy Act provides that exemptions allowed by Section 6 are for the Bankrupt's daily subsistence.

Since the creation of the Bankruptcy Act in 1898, and its earliest interpretation, it has been well established that the intent of the Bankruptcy Act is to relieve the debtor of his honest debts and permit him a fresh financial start. See *Wetmore v. Markoe,* 196 U.S. 68, 77 (1904); *Williams v. United States Fidelity & Guaranty Co.,* 236 U.S. 549 (1915); *Stellwagen v. Clum,* 245 U.S. 605 (1918) and *Local Loan Co. v. Hunt,* 292 U.S. 234 (1934). A "fresh start" without the burden of past debts is what the Bankrupt seeks when he files his petition in bankruptcy.

In order for the Bankrupt to achieve the fresh financial start, he is obligated to comply with the provisions of the Bankruptcy Act. Section 70 of the Bankruptcy Act states that:

> The trustee of the estate of a Bankrupt . . . *shall* . . . *be vested by operation of law* with the title of the

> Bankrupt as of the date of the filing of the petition . . . except insofar as it is to property which is held to be exempt. . . (Emphasis supplied.)

The Trustee claims certain rights of the Bankrupt. Among those rights is the right to collect money earned prior to bankruptcy, and owed to the Bankrupt on the date of adjudication.

The Petitioner now contends that he needs these non-exempt funds for his daily needs. Even though this argument has not been raised in the lower courts, Section 6 of the Bankruptcy Act allows the Bankrupt whatever exemptions that his resident state permits. Such exemptions are for the daily needs and subsistence of the Bankrupt. The Sixth Circuit Court of Appeals in the instant case herein held that:

> . . . such wages frequently become available during the bankruptcy proceedings and the statutorily authorized exemptions provide the bankrupt with a purse from them to meet his basic needs.

C. A wage turn-over order differs markedly from a wage garnishment, and absent a demonstration of financial hardship in no way encumbers a bankrupt from making a fresh financial start.

There is a lack of relevancy between Petitioner's reference to wage garnishments and the rights granted under Section 70 of the Bankruptcy Act. There are a great many differences between garnishments and wage turn-over orders.

Among the major differences are the parties affected. In a garnishment the court orders the employer of the debtor to withhold a certain sum and pay it immediately

into court. A wage turn-over order is an order against the Bankrupt to pay certain sums into the estate for all creditors. Garnishments are three party actions and turn-over orders are two party actions. A wage turn-over order in no way affects the Bankrupt's relationship with his employer since the money requested is already in the Bankrupt's possession. Further, the compliance with a wage turn-over is not as harsh as a wage garnishment may be. In the instance of a wage turn-over order, the Bankrupt is given a reasonable time to comply with the order.

In the case at bar the $71.50 is non-exempt money that is property and vests in the trustee. The trustee was performing his duty in collecting that property under Section 47 of the Bankruptcy Act which states that the trustee "shall collect and reduce to money the property of the estates for which they are trustees. . ." In *Brown v. Crawford*, 252 Fed. 248 (D.C., Ore. 1918) at page 252 the court said:

> This covers any interest in the property the Bankrupt may have had, however minute, that was subject to transfer by him or levy or sale by judicial process. This statute is designed to be so broad and searching as to comprise all property that the Bankrupt may have that may be of use or benefit to him no matter how small.

CONCLUSION

The Petition for Writ of Certiorari is a prerogative Writ within the discretion of the Supreme Court of the United States. It is granted when there is a substantial question of law and when the issues were raised in the lower courts of the first instance. There is no substantial question of law and all the issues raised in Petitioner's Brief are not properly raised in this case at this time. The Sixth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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